

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket No.: CWA-08-2006-0024

APR 20 AM 10:16
FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF)	
)	
Fremont Paving and Redi-Mix, Inc.)	COMPLAINT AND
P.O. Box 841)	SETTLEMENT AGREEMENT
Canon City, CO 81215)	
<u>Respondent.</u>)	

A. PRELIMINARY MATTERS

1. This Complaint and Settlement Agreement ("CASA") is issued to Fremont Paving and Redi-Mix, Inc. ("Respondent") for violating sections 311(b)(6)(A), 33 U.S.C. §1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. §1321(j)(1)(C) of the Clean Water Act ("CWA" or "the Act") and the implementing regulations at 40 CFR part 112.
2. The undersigned Environmental Protection Agency ("EPA"), Region 8 official has been properly delegated the authority to issue this CASA under the authority vested in the Administrator of EPA by section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990.
3. This section authorizes EPA to bring an action under section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §1321(b)(6)(B)(ii), for civil administrative penalties against Respondent who has violated, or is in violation of, a requirement or prohibition of the CWA or its implementing regulations.
4. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 CFR part 22.

5. This CASA is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 CFR §22.13(b), and executed pursuant to 40 CFR §22.18(b)(2) and (3) of the Consolidated Rules of Practice.

6. Respondent admits the jurisdictional allegations contained herein and neither admits nor denies the specific factual allegations contained herein.

7. Respondent waives its rights to a hearing before any tribunal, to contest any issue of law or fact set forth in this CASA.

8. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondent agree that entry of this CASA and Final Order without further litigation and without adjudication of any issue of fact or law, is the most appropriate means of resolving this matter.

9. This CASA, upon incorporation into a Final Order, applies to and is binding upon EPA and upon Respondent, and Respondent's officers, directors, employees, agents, successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this agreement.

10. This CASA contains all terms of the settlement agreed to by the parties.

B. ALLEGED VIOLATIONS

1. Respondent is a corporation organized under the laws of Colorado, and a "person" within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§1321(a)(7) and 1362(5).

2. The Respondent owns and operates two hot mix asphalt plants, a cement concrete batch

plant, a maintenance shop, a screening plant, a parts storage warehouse, wash bays, and a fabrication shop located at 839 Mackenzie Avenue, Canon City, Colorado ("facility").

3. Respondent is, an "owner and operator" of an "onshore facility" within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

4. The facility is a "non-transportation related" onshore facility within the meaning of 40 CFR §112.2.

5. At the facility, Respondent stores, transfers, distributes, uses or consumes diesel fuel, asphalt cement, hydraulic fluid, used oil, tack oil, and/or heating oil, which are "oils" as defined at §311(a)(1) of the Act, 33 U.S.C. §1321(a)(1).

6. The Respondent's non-transportation onshore facility is subject to the oil pollution prevention requirements of 40 CFR part 112, pursuant to section 311(j) of the Act, 33 U.S.C. §1321(j), and its implementing regulations.

7. Respondent's facility is a facility, which due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 CFR § 110.1) or its adjoining shoreline and may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or (3) cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

8. Section 311(j)(1)(C) of the Act, 33 U.S.C. §1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from vessels and from onshore and offshore facilities, and to contain such discharges"

9. 40 CFR § 112.3 requires that owners or operators of onshore facilities prepare and implement a Spill Prevention, Control, and Countermeasure ("SPCC") plan in writing, and in accordance with applicable sections of part 112, including, but not limited to, sections 112.7 and 112.8.

10. Section 311(b)(6)(A) of the Act, 33 U.S.C. §1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by ... the Administrator.

11. On or about May 4, 2005, an oil spill of approximately 77 barrels flowed from a retention pond on the northeast part of the Respondent's facility and impacted the Arkansas River and various irrigation and water supply ditches and creek drainages between Canon City and Pueblo, including the Minnequa Canal, the Florence Flood Irrigation system, the Chandler Creek drainage, the Fawn Hollow drainage, and the Oak Creek drainage.

12. The Arkansas River and the various irrigation and water supply ditches and drainages referenced in paragraph 11, supra, are "navigable waters" and "waters of the United States" within the meaning of section 502(7) of the Act, 33 U.S.C. §1362(7) and 40 CFR §110.1.

13. On or about May 18, 2005, EPA conducted an unannounced SPCC inspection ("the Inspection") of the facility.

14. At the time of the Inspection, the facility had a total fuel storage capacity of approximately 87,900 gallons.

15. The facility did not have a written SPCC plan at the time of the Inspection.

16. At the time of the Inspection, the facility had inadequate secondary containment around the 8,000 gallon and 10,000 gallon tanks in the fueling area and had no secondary containment around the other oil and/or oil and produced water tanks or drums at the facility.

17. The facility failed to provide secondary containment for the truck loading and/or unloading areas at the time of the Inspection.

COUNT I

18. Section 311(b)(3) of the Act, 33 U.S.C. §1321(b)(3), provides that "the discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States...is prohibited."

19. Respondent's release of approximately 77 barrels of oil on May 4, 2005, into navigable waters of the United States constitutes one violation of section 311(b)(3) of the Act, 33 U.S.C. §1321(b)(3).

COUNT II

20. The Respondent failed to prepare and to implement an SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 as required by 40 CFR §112.3.

21. Respondent's failure to prepare and to implement an SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 for the past year constitutes a violation of 40 CFR §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

C. CIVIL PENALTY

1. Respondent has demonstrated to the satisfaction of EPA that Respondent has achieved compliance with the requirements that formed the basis of the Complaint.
2. Respondent, by signing this CASA, herein certifies to EPA that Respondent is now in compliance with each of the relevant provisions of the CWA.
3. Based on the foregoing Allegations, Respondent's agreement to perform a Supplemental Environmental Project ("SEP"), and pursuant to the authority of section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §1321(b)(6)(B)(ii), and 40 CFR § 19.4, Complainant proposes the assessment of administrative penalties against the Respondent in the amount of thirty seven thousand eight hundred ninety dollars (\$37,890). Complainant proposes this penalty amount after considering the Respondent's willingness to perform a Supplemental Environmental Project ("SEP") described below, and the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. §1321(b)(8): the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.
4. Respondent consents to the issuance of a Consent Order and consents for the purposes of settlement to the payment of the civil penalty in the amount of thirty seven thousand eight hundred ninety dollars (\$37,890).
5. Within thirty days (30) of receipt of the Final Order issued by the Regional Judicial Officer, Respondent shall pay the agreed upon civil penalty in the amount of thirty seven

thousand eight hundred ninety dollars (\$37,890) by remitting a cashier's or certified check payable to **"Oil Spill Liability Trust Fund,"** with the docket number and Respondent's name written on the check, to:

Donna K. Inman
Technical Enforcement Program (8ENF-UFO)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

A copy of the transmittal of payment shall be sent simultaneously to the following address:

Tina Artemis
Regional Hearing Clerk
U.S. EPA, Region 8 (8RC)
999 18th Street, Suite 300
Denver, Co 80202-2466

(and)

Brenda L. Morris
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, Co 80202-2466

6. Pursuant to 31 U.S.C. §3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if the penalty is not paid when due. Interest will be assessed at the United States Treasury tax and loan rate in accordance with 4 CFR §102.13(c). A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorneys fees. In addition, a penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due. Any such penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 4 CFR §§102.13(d) and (e).

7. The penalty specified in Paragraph B.3., supra, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

D. SUPPLEMENTAL ENVIRONMENTAL PROJECT ("SEP")

1. The parties agree that Respondent's penalty should be mitigated by a Supplemental Environmental Project ("SEP") which is defined in Exhibit A to this CASA.
2. Within thirty days (30) days of receipt of a signed Final Order in this matter, the Respondent agrees to undertake the SEP which is to aid Canon City Area Recreation & Park District ("CCARPD") in the development of constructing a large wetland and water body by performing excavation, dirt work, and construction.
3. Respondent agrees that any dirt or other material excavated or moved by Respondent to construct the wetland will not be sold or used as barter by Respondent to obtain any economic benefit in performing the SEP.
4. Respondent agrees to complete the SEP by no later than November 1, 2006, and expend a total of not less than seventy five thousand dollars (**\$75,000.00**) on the SEP.
5. Respondent hereby certifies that, as of the date of this CASA, Respondent is not required to perform or to develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or to develop the SEP by agreement, grant or as injunctive relief in this or any other case or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.
6. Whether Respondent has complied with the terms of this CASA, including the excavation, dirt work, and construction as detailed in Exhibit A shall be the sole determination of EPA.

7. Respondent shall provide Complainant with a SEP Completion Report by no later than November 30, 2006, and mail it to: Brenda L. Morris, at the address listed in Paragraph C.5.

supra. The SEP Completion Report shall include:

- a. photographs documenting the area to be excavated before and after implementation of the SEP;
- b. itemized costs of the SEP; and
- c. copies of work orders, invoices, receipts and canceled checks evidencing the total expenditure of the SEP of \$75,000.00.

8. In the event that Respondent fails to comply with any of the terms or provisions of this CASA relating to the performance of the SEP described in Paragraph D.2., supra, and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in Paragraph D.4., supra, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- a. For failure to expend \$75,000.00, Respondent shall pay the difference between \$75,000 dollars and the amount actually spent by Respondent.
- b. For failure to submit the SEP Completion Report or for failure to include the requisite documentation in the SEP Completion Report required by Paragraph D.7., supra, Respondent shall pay a stipulated penalty in the amount of \$100 for each day after the thirtieth day following the completion of the SEP until a fully accurate SEP Completion Report is submitted.

9. Respondent shall pay stipulated penalties within fifteen (15) days of receipt of written demand by EPA for such penalties.

E. TERMS AND CONDITIONS

1. Nothing in this CASA shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this CASA.

2. Respondent shall maintain legible copies of documentation of any and all documents or reports submitted to EPA pursuant to this CASA for a period of not less than three years, and Respondent shall provide the documentation to EPA within seven days of a request for such information. In all documents or reports, including, without limitation, the SEP Completion Report, submitted to EPA pursuant to this CASA, Respondent shall, by its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

3. Any public statement, oral or written, made by Respondent making reference to the SEP shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency for alleged violations of the Clean Water Act, as amended by the Oil Pollution Act."

4. Respondent hereby agrees not to claim any funds expended in the performance of the SEP as a deductible expense for purposes of Federal taxes.

5. This Agreement shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law.

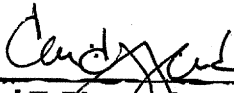
6. Failure by Respondent to comply with any of the terms of this CASA shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.
7. Nothing in this CASA shall be construed as a waiver by the EPA of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this CASA.
8. Each undersigned representative of the parties to this CASA certifies that he or she is fully authorized by the party represented to bind the parties to the terms and conditions of this CASA and to execute and legally bind that party to this CASA.
5. The parties agree to submit this CASA to the Regional Judicial Officer, with a request that it be incorporated into a Final Order.
6. This CASA, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the violations alleged in this CASA.
7. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this CASA.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8, Office of Enforcement, Compliance
and Environmental Justice, Complainant.**


Date: 4/19/06

By: Elisabeth Evans
Elisabeth Evans
Director
Technical Enforcement Program

Date: 19 April 2006

By: 
Michael T. Risner, Director
David Janik, Supervisor
Legal Enforcement Program

Date: April 20, 2006

By: 
Brenda L. Morris, Attorney
Legal Enforcement Program

FREMONT PAVING AND REDI-MIX, INC.,
Respondent.

Date: 4-17-06

By: 
(Signature of Authorized Agent)

John L. Ary
Type or print name of signatory

COMPLAINANT'S
EXHIBIT # A

Ranson & Kane, P.C.
Attorneys & Counselors at Law
3475 Briargate Boulevard, Suite 201 • Colorado Springs, CO 80920
phone 719.593.2121 • fax 719.593.1818

Richard P. Ranson
ranson@ranson-kane.com

Jason P. Kane
jkane@ranson-kane.com

January 26, 2006

Brenda Morris, Esq.
U.S. Environmental Protection Agency
Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

VIA FACSIMILE
303-312-6953

Re: ***Fremont Paving & Redi-Mix, Inc.***
Supplemental Environmental Project ("SEP") Proposal

Dear Ms. Morris:

Thank you for your continuing cooperation in this matter. I hope this proposal, either in its current form, or as modified by us during subsequent discussion, will be approved by your Agency.

1. Proposal: Fremont Paving & Redi-Mix, Inc., ("FPRM", hereinafter) proposes to do certain excavation, reclamation, and contouring for the benefit of the Canon City Area Recreation & Park District ("CCARPD") (575 Ash, Canon City, CO 81212) in regard to the development of Pathfinder Regional Park ("The Park"). The Park, to be constructed along the Arkansas River, and will consist of 180 acres of wildlife habitat and wetlands, as well as extensive public recreational facilities. The Park will be located just west of Florence, CO, and north of Colorado State Highway 115. The Park is in an area affected by the oil spill. The development of wildlife, water fowl, and fishery habitats in the wetland will provide significant environmental benefits to the Fremont County area.

2. Background Information: Canon City Area Recreation & Park District is a city/county government agency charged with responsibility for developing and maintaining a regional park system in the area bordered by Canon City and Florence, CO. With a \$500,000 grant from the Cotter Natural Resource Damage Recovery Fund, CCARPD purchased the site of Pathfinder Park from CF&I, along with smaller contributions from Fremont RE-2 School District and Fremont County. Access to the property from State Highway 115 will be provided by a \$300,000 grant from the Energy and Mineral Impact Fund (State of Colorado). The funds will be used to construct

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access lanes from State Highway 115. The Park is to be constructed in three phases. Total grants obtained to date for development of this park total \$1.4 million.

3. Specific Proposal: CCARPD has a plan to excavate, reclaim and contour an area which is now two (2) small wetland areas into one (1) much large wetland. As proposed the two (2) existing wetland areas, which are not currently connected, will be enlarged and connected so as to create a self-sustaining wetland area that will support wildlife, ground nesting water fowl and various types of fisheries. In consultation with the Colorado Department of Wildlife ("DOW"), the Colorado Department of Natural Resources, and the Army Corps of Engineers, CCARPD has designed and planned a unique Park which will attract and benefit the public at large. In order to carry out the plans and designs, and to create and develop the wetland areas, a significant amount of excavation, reclamation and contouring of existing ground will be required. The funds for said development of the wetlands do not now exist in the current Park budget.

4. Costs: CCARPD obtained preliminary cost estimates for the desired excavation, reclamation and contouring for the wetland project. At the time of planning, CCARPD budgeted the amount of \$125,000 for the desired work. As a part of this proposal, FPRM reviewed the excavation requirements, and believes the work can be accomplished at a cost of \$75,000. FPRM intends to incur costs and expenses of \$75,000 to undertake and complete the required dirt work.

5. Contact Person: FPRM has discussed this matter with Jim Hoar, CCARPD director. His telephone number is (719) 275-1578. Mr. Hoar is delighted and excited that the wetland project may be able to proceed during the next construction season, rather than be delayed for several years while funding is secured.

6. Compliance: This SEP complies with EPA Supplemental Environmental Project Policy for the following reasons:

a. The proposed project will be environmentally beneficial to areas which were affected by the May 4th oil spill. This project involves development of wetland areas which drain to the Arkansas River. The plan is to significantly expand an existing wetland area into a much larger, self-sustaining wetland, and in the process develop and enhance wildlife habitats, ground nesting water fowl nurseries and various fisheries.

b. This proposal is made to settle a pending enforcement action. At this time I do not believe a CWA case number has been assigned.

c. FPRM is not otherwise legally obligated to provide and perform the excavation, reclamation and contouring contemplated by this agreement.

d. There is a clear and direct nexus between the proposed project to develop additional wetlands and the alleged violation. The proposed project will enhance and further the protection of waters of the United States from prohibited spills.

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e. The proposed project clearly advances the stated objectives of the Clean Water Act, namely, to restore and maintain the chemical, physical and biological integrity of the Nation's waterways.

f. It is acknowledged that EPA will have no role in advancing or managing any funds related to the proposed SEP.

g. If this proposal is acceptable, the SEP will become a part of the settlement agreement (CASA) and will be referenced and incorporated in the CASA.

h. The proposed project is not a responsibility of EPA, and EPA is in no way required to provide or perform any services with regard to Pathfinder's Regional Park.

7. Conditional: This proposal is expressly contingent upon receipt of approval by EPA that Fremont Paving will receive penalty mitigation credit in the approximate amount of \$75,000.

8. Summary: The proposed project will directly benefit an area that was part of the spill, will improve and enhance wetland areas along the Arkansas River, may act to reduce risks to the environment and waters of the use in the event of a future spill, and will benefit the public, and certainly those members of the public who may not otherwise have the economic means to observe and enjoy a wildlife, water fowl and fisheries firsthand. Fremont Paving believes there are significant environmental benefits to the public from this project, and requests your favorable consideration.

Cordially,

RANSON & KANE, P.C.



Richard P. Ranson

RPR/tbe

cc: John Paul Ary, Fremont Paving & Redi-Mix, Inc.